No. 14,947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEANING DRIVERS LOCAL NO. 928, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL NO. 52, LAUNDRY & DRY CLEANING WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

STEVENSON & HACKLER,
By HERBERT M. ANSELL,
1616 West Ninth Street,
Los Angeles 15, California,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbook

No. 15,947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEANING DRIVERS LOCAL NO. 928, Affiliated With INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL NO. 52, LAUNDRY & DRY CLEANING WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

Statement of the Case.

Southern Service Company, Ltd., herein called Southern, is a California corporation, operating approximately 30 laundries throughout California, including one in Long Beach called Long Beach Linen Supply. Both respondents are labor organizations, and are engaged in transacting business and in promoting and protecting the interests of their employee, members. Upon a charge filed on behalf of Southern, on August 16, 1956, the General

Counsel of the National Labor Relations Board issued his complaint against respondents alleging that they had violated and were violating Section 8(b)(4)(A) and (B) of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C., Sec. 151, herein called the Act.[1]

The complaint alleged that for a period in August, 1956, and since October 8th of that year, the Respondents, by means of picketing, had induced and encouraged employees of customers of Southern and of suppliers to those customers, to engage in strikes, or concerted refusals in the course of their employment, to perform services for their respective employers, with the object of forcing and requiring such customers to cease using the services of Southern and to cease doing business with Southern, and to force or require Southern to recognize or bargain with the Respondents as collective bargaining representatives of certain of Southern's employees, although neither Respondent had been certified as such representative pursuant to Section 9 of the Act. [R. 5-6.]

The Board's application for injunctive relief under Section 10(1) of the Act was denied by District Judge William Byrne on December 3, 1956. At this hearing, all parties were represented, and were permitted to examine and cross-examine witnesses, and to offer evidence pertinent to the issues. The District Court's decision was based on the finding that the Respondents confined the appeal of their picketing to the customers and patrons of Southern's customers, and that no effort was made by the Respondent Unions to induce or encourage employees of any employer to cease work or refuse to handle or deliver any mer-

---

[1]References to pages of the printed record are designated "R." and to the official transcript, "Tr."

chandise.[2] At the hearing before the Trial Examiner, all parties stipulated that the transcript of testimony and exhibits offered and received in the Section 10(1) hearing would constitute the entire record in the Board case. The Trial Examiner found that the Respondents had not violated Section 8(b)(4)(A) or (B). The Board, while adopting the Trial Examiner's findings of fact concluded that the conduct involved was violative of Section 8(b)(4)(A).

The Board's Findings of Fact.

The following facts appear from the findings of the Trial Examiner and the uncontradicted supporting evidence. There was no conflict in the testimony.

For a number of years the Respondents had made unsuccessful attempts to organize employees of Southern, but at the time of the picketing, described herein, no recent demand for recognition had been made upon Southern.

Learning in late spring or early summer of 1956 that the State convention of the American Federation of Labor was scheduled to be held in Long Beach, the Respondents protested to the Central Labor Council in Long Beach that such a gathering of Union officials would result in a substantial increase of business to restaurants in the area which were using the nonunion linen supply service of Southern. [Tr. 44.] When their protests did not succeed in having the convention moved to another city, the Respondents told officials of other labor organizations that for the period of the convention pickets would be placed outside some or all restaurants in the area using South-

---

[2]This decision is fully reported in 39 LRRM 2381.

ern's linen service to advertise that fact and thus to encourage the visiting Union representatives to refrain from patronizing such restaurants. It was made clear to these officials that Respondents did not desire the restaurant employees to engage in work stoppages. [Tr. 46.] These union officials in turn conveyed this information to their members employed by the restaurants to be picketed. In the meantime efforts were made to persuade Long Beach restaurants to switch their custom to linen service companies employing members of the Respondent unions. Representatives of Respondents explained to the restaurant owners that an advertising picket line would be set up to divert customer patronage to restaurants using a unionized laundry.

In this regard, Respondents made it clear that the picket lines were to be directed solely to the consuming public and more specifically to the visiting Union delegates, and were not in any way directed to the employees of the restaurants or of suppliers doing business with the restaurants. [Tr. 75.] The Respondents stated that they were not interested in causing a strike of the restaurant employees or of causing any delay or stoppage of shipments to or from the restaurants. [Tr. 78-81, Resp. Exs. E and F.] The restaurant owners clearly understood this through their conversations with representatives of Respondents and with representatives of the Unions to whom their own employees belonged. Following conversations with Respondents, the restaurant association published ads in the local newspapers informing the public that they were not involved in any dispute with their own employees. The

restaurants also called supplier firms and informed them that the picket lines were not intended to dissuade employees from making deliveries, but were directed exclusively to the consuming public in an effort to divert patronage. [Tr. 76-77.]

For the period of the convention, August 13 through 18, 1956, pickets were placed outside the customers' entrances of about 15 Long Beach restaurants. The pickets each carried the following sign:

> "NOTICE TO THE PUBLIC. THIS ESTABLISHMENT'S LINENS ARE BEING PROCESSED BY A NONUNION LAUNDRY."

All but four of the restaurants picketed had a separate entrance for employees and suppliers. No pickets were placed at these entrances used by employees rather than patrons. [R. 14.] On August 20, 1956, a representative of Respondents wrote to the owner of Madsen's restaurants and informed him that a campaign was being carried on to increase the patronage of laundry and linen supply service companies whose employees were unionized, and that the Respondents would continue picketing Madsen's for this purpose. He reiterated that Respondents did not desire any work stoppage on the part of the restaurant employees or by employees of supplier firms. [Resp. Ex. "E."] This was followed by a second letter dated August 27, 1956, again calling attention to the limited purpose of the picketing and inviting Madsen's to show the letter to its employees and to employees of supplier firms in order that any possibility of work stoppages or delays be elimi-

nated. [Resp. Ex. "F" Tr. 81.] On October 8, 1956, picketing again resumed at Madsen's restaurant.

At the four restaurants mentioned in the complaint, namely, Madsen's, Grisinger's Drive-Ins, and Jack's Corsican Room, picketing took place only during those hours when business was at its height—at usual meal times. No picketing was done at the earlier hours when employees of the restaurants were reporting for work. [R. 15, Tr. 83, 84.] Since deliveries were received at uncertain hours, there were occasions when employees of suppliers approached the restaurants at a time when pickets were present. At all but the above named restaurants there were separate entrances for employees and customers and, in these cases, pickets at no time appeared at the employee entrances. [R. 14.]

1. *The picketing at Madsen's restaurant.*

The customer entrance borders on the corner of American and Ocean Avenue. Employees of the restaurant also use this entrance and some small parcels are delivered through there. On the American Avenue side, there is a sidewalk chute through which large deliveries are made. There is also on American Avenue a door which is kept locked all of the time. From August 15 to 18, pickets patrolled the length of the restaurant on American and Ocean Avenue and walked over the sidewalk chute. When the one-man picket line resumed on October 8, 1958, the picket did not walk over the chute, but patrolled on the sidewalk between the chute and the curb. The Ocean-American entrance and the sidewalk chute are the only means of in-

gress and egress in use. The restaurant is located one block from where the Union convention was held. [Tr. 56-58, 61, 72.] None of the Madsen employees left work as a result of the picket line. When these employees made inquiries as to the nature of the picket line, the restaurant owner informed them in light of his conversations with representatives of Respondents and other unions, that the line did not effect them. [Tr. 81, 82.] On the first day of picketing Harley Schaefer, an employee of an ice cream company, was preparing to make a delivery at Madsen's when a driver for a bakery company volunteered the opinion that Schaefer might be fined by his Union if he did so. On the sole basis of this statement, he failed to make delivery that day. Later that same day his company informed him that the picket line was not designed to stop deliveries. At no time did any picket nor any union agent instruct him not to make deliveries. [Tr. 155.] A few days later, he commenced making his regular deliveries despite the existence of the picket line. [Tr. 155.] Outside of this one incident, the record is void of any further instances when deliveries were delayed to any degree because of the picket line.

2. *Picketing at the Grisinger Drive-In restaurants.*

The two Grisinger restaurants are located at 4930 Atlantic Boulevard and 1632 East Fourth Street, both in the City of Long Beach. The Fourth Street restaurant is about one mile, and the Atlantic Avenue restuarant is 5 or 6 miles from the convention hall. [R. 13, Tr. 136.] The entrances to both restaurants are used by em-

ployees and customers alike. A single picket patrolled solely at such entrances. Allan Russell, a driver for a meat company, drove around to a rear alley and signalled the cook, who came to the truck to get the meat. There were no pickets at the rear of the restaurant or of the alley. [Tr. 139.] Russell made no inquiry concerning the picket line, and was never advised whether or not to cross it. However, had he asked either his Union, employer or Grisinger's representative, he would have been informed that the picket line was not intended to interfere with deliveries. [R. 16, Tr. 147.] Edward Graham, an employee of Grisinger's, testified that from reading the picket sign, he was of the belief that he was not being asked to refuse to perform work. In this connection he testified that he believed if the Union wanted him to cease work, he would have been so informed. [Tr. 140.] Graham testified that outside of the Russell incident, a breadman and milkman delayed making delivery until they contacted their Union, and when informed they could do so, they returned the same day and made delivery. [Tr. 141, R. 16.] Beside these three incidents all deliveries were made normally. None of the employees of the restaurants failed to report for work or failed in any respect to perform duties for their employer because of the picketing. [R. 16.]

ARGUMENT.

In the Absence of Proof by Substantial Evidence That Respondents Induced or Encouraged Employees to Engage in Work Stoppages, It Is Mandatory to Conclude That Respondents Did Not Violate Section 8(b)(4)(A) of the Act.

The National Labor Relations Act did not make unlawful all picketing at secondary premises. Requests and inducements addressed directly to secondary employers are not violative of the Act. *Rabouin v. N. L. R. B.,* 195 F. 2d 906, 911-912; *N. L. R. B. v. Associated Musicians of Greater New York, Local 802,* 226 F. 2d 900. Picketing inducing customers to withhold their patronage from neutral concerns in order to cause a cessation of dealings between the neutral and primary disputant are lawful. *N. L. R. B. v. Service Trade, Chauffeurs, Salesmen & Helpers, Local 145,* 191 F. 2d 68; *N. L. R. B. v. Electrical Workers, CIO,* 228 F. 2d 553; *Capital Service v. N. L. R. B.,* 204 F. 2d 848. The only activity proscribed by Section 8(b)(4) is inducement or encouragement of the *employees* of secondary concerns or of the suppliers thereof. If the activities in question do not violate the *express prohibition* of Section 8(b)(4), then they are lawful and protected within the meaning of Section 7 of the Act. *Garner v. Teamsters,* 346 U. S. 485; *Weber v. Anheuser-Busch,* 348 U. S. 468.

The sole question involved in this case is whether the Respondents by engaging in peaceful picketing at Madsen's, Grisinger's and Jack's Corsican Room, induced or encouraged the *employees* of any employer to engage in a *concerted refusal* to perform work at these restaurants. Since the record is barren of any evidence of work stoppages or inducement or encouragement thereof as to the

employees of the restaurants above named, this inquiry is limited as to employees of suppliers of the restaurants.

The Board has the burden to support its findings of fact and findings based on factual inferences by substantial evidence in the light of the whole record. *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474. Having found the facts, the Board must correctly interpret the Federal Act. Netterville, Administrative "Questions of Law" and the Scope of Judicial Review in California, 29 So. Cal. L. Rev. 434, 464. It is clear that unless the evidence supporting the Board's decision in the instant case is substantial, this Court is fully empowered to set it aside. As the Supreme Court stated in *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, 488:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence, opposed to the Board's view."

The *Universal Camera* case similarly makes it clear that the decision of the Trial Examiner is afforded great weight in considering whether the evidence in support of the Board's decision is substantial. In this connection, the Court states at page 496:

> ". . . evidence supporting a conclusion may be *less substantial* when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." (Emphasis added.)

It is solely the facts and reasonable inferences based thereon that determine whether the Board's decision can stand.

The Evidence When Considered as a Whole Makes It Clear That the Picketing by Respondents Was Clearly and Unequivocably Addressed to Customers of the Restaurants and Therefore Did Not Violate Section 8(b)(4) of the Act.

It is of major importance to note the basis upon which the Board differed in its conclusions from those reached by the Trial Examiner. In this connection the Board adopted the Trial Examiner's findings of fact [R. 20] but bottomed its decision solely on the inference that the mere existence of the picket line would have a natural effect of inducing and encouraging employees not to work behind it. [R. 22.] The Board in its decision completely disregarded the following undisputed findings of fact previously referred to:

(1) Prior to the commencement of any picketing, Respondents informed the Unions whose members were employed at the restaurants that the economic activities would be directed solely to customers of the restaurants and that it was not the desire of Respondents to cause work stoppages by the employees.

(2) Prior to the picketing, the Respondents so informed the restaurant owners and invited them to make this clear to their employees, suppliers and employees thereof.

(3) Outside of the four restaurants having common employer-customer entrances, all other picketed restaurants had separate means of ingress and

egress for employees and none of these entrances were picketed.

(4) At the four restaurants having common entrances, it was impossible to appeal to patrons without crossing these entrances.

(5) The legend on the picket banner was clearly and unequivocably directed solely to the patrons of the restaurants.

(6) Neither the Respondents, nor anyone authorized to speak for them, ever requested or intimated in any manner that employees of the restaurants or suppliers thereof should not continue to perform services for the restaurants.

(7) Outside of four incidents involving deliverymen, all services performed for and deliveries to the restaurants continued in a normal and customary manner during the period of the picketing.

(8) Of these four incidents, one driver, Harley Schaefer, and two unidentified drivers delayed making deliveries only until confirming through their respective Unions that it was proper to do so. The fourth, Allan Russell, never made inquiries of anyone, but made his deliveries without any interference through the rear entrance.

(9) The timing of the picketing substantially coincided with the presence in the area of a large number of union-minded restaurant patrons.

These clear undisputed facts establish that the Respondents took reasonable steps to limit the effect of their picketing to customers and avoid causing work stoppages by employees. On the basis of these facts, both the District Court judge in the Section 10(1) hearing and the

Trial Examiner in the Board hearing concluded that Respondents' picketing was lawful. The General Counsel in seeking enforcement of the Board order in effect urges adoption of the proposition that any and all secondary picketing is *per se* violative of the Act if the picket line *can be seen* by employees performing services for or making deliveries to the secondary employer. Such a proposition totally unsupported by any authority would for all practical purposes effect a blanket prohibition against all secondary picketing.

Case law on this subject is completely opposed to the extreme proposition urged by the General Counsel. The main factual points relied upon by the General Counsel in support thereof have been totally rejected in several well reasoned decisions. These points can be briefly stated as follows:

1. Respondents' picketing at four entrances occurred at entrances used by customers and employees.
2. Four incidents occurred wherein delivery employees delayed going through the picket lines until contacting their Unions.
3. The mere presence of a picket line has the natural effect of inducing work stoppages.

(a) Incidental Picketing at Common Entrances.

In *N. L. R. B. v. Electrical Workers CIO,* 228 F. 2d 553 (1955), cert. den. 100 L. Ed. 698, the Second Circuit was faced with a factual situation closely similar to that in the instant case. In that case, a struck typewriter manufacturer farmed out his repair work to independent repair companies. The Union engaged in picketing at the situs of the repair concerns and also at the premises of substantial customers of the struck manufacturer. The

Board prosecuted on the theory of Section 8(b)(4)(A), both as to the repair concerns and the customers. The repair concern picketing was held not violative of the Act on the basis of "alley doctrine." The picketing at customer premises which concededly was for the purpose of causing a cessation of dealings with the manufacturer was carried on at entrances used in common by the public, employees of the secondary customers and deliverymen. As in the instant case, the picketing at entrances used by employees and customers alike was confined to premises which did not have sparate employee entrances. The picketing was carried on during ordinary business hours and during the time when some employees went to lunch. In at least one instance, picketing began before the start of employee working hours. The Court stressed the fact that none of the employees of the secondary concerns, as here, engaged in work stoppages and stated that since there was

> ". . . neither intent to induce, nor effective inducement, nor even probable inducement of employees, we conclude that there is no substantial evidence to support the Board's finding of unlawful inducement an encouragement of employees in violation of Section 8(b)(4)(A)."

Significantly, the place, manner of picketing and placard legend utilized were substantially identical to that employed in the instant case.

A closely analogous factual situation was considered by the Fifth Circuit in *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968, etc., et al.*, 225 F. 2d 205 (1955). In that case the primary employer was a subcontractor at various locations, and his employees worked alongside those of neutral subcontractors. The

Union picketed at the various job sites after its request for permission to enter the premises and picket close to the primary disputant's employees was denied by the general contractor. As a result of the picketing, some employees of neutrals engaged in work stoppages. The Board contended that since the primary disputant had a warehouse several miles from the job sites, the Union's decision to picket at the job sites gave rise to an inference that its purpose, partly at least, was to induce employees of neutrals. The Court, in rejecting this argument, stated at page 209:

> "Irrespective of the Board formulated 'situs' theory, however, we think such peaceful picketing upon common premises directed solely against the primary employer with whom a labor dispute exists, is still lawful under the Act, *and that any adverse effect upon secondary, neutral employees must necessarily be viewed as incidental to the lawful exercise of that statutory right.*" (Emphasis added.)

By direct analogy to the instance case where incidental picketing occurred at customer-employee entrances, the Court stated:

> "Futhermore, it is practically without dispute that the pickets appeared after the men had began work, and located themselves *as close as possible* to the place where the Otis Massey craftsmen were engaged in the normal business of that company." (Emphasis added.)

The analogy of these cases to the instant factual situation is patent. Where, as in the instant case, the Union engages in picketing at a secondary situs, regardless of whether employees of the primary disputant also are located there, the test of lawfulness is whether the Union

conducts the picketing in such manner as to make it reasonably apparent under the circumstances that the purpose and the effect is not to induce or encourage employees of neutrals. Whereas evidence as to *concerted* work stoppages is relevant in determining the Union's intent, incidental isolated instances of work stoppages such as involved in *General Drivers* and isolated instances of mere delay by individuals as involved in the instant case do not render the Union's conduct unlawful if the over-all method of carrying on the activities is not proscribed by the Act.

(b) Four Incidents of Delay in Delivery.

It should be recalled that the picketing at 15 restaurants brought about a delay in deliveries in only four instances, and further, that none of the restaurant employees engaged in work stoppages. This situation is analogous to that involved in *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. In that case the Board prosecuted a Section 8(b)(4)(A) charge on the basis of an incident occurring when two employees of a neutral customer attempted to cross the picket line. The pickets used force to prevent the neutral employees from entering the premises of the primary employer. The Court assumed that this incident induced and encouraged the two employees to engage in a work stoppage for the proscribed unlawful objective. In concluding that the inducement and encouragement did not amount to "concerted activity" within the meaning of the Act, the Court said:

> "While each case must be considered in the light of its surrounding circumstances, yet the applicable proscriptions of Sec. 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer. That language contemplates inducement or encouragement

> to some concert of action greater than is evidenced by the picket's request to a driver of a single truck to discontinue a pending trip to a picketed mill. There were no inducements or encouragements applied elsewhere than on the picket line."

In *Operating Engineers Union,* 117 N.L.R.B. No. 166 (1957), where the Union incidentally induced one employee of a neutral employer to engage in a work stoppage, the Board, in finding the conduct did not violate Section 8(b)(4)(A) of the Act stated:

> "The Board has consistently held that the inducement of only a single employee under these circumstances is not a violation of the Act."

In *N. L. R. B. v. General Drivers, Warehousemen and Helpers, Local 968, supra,* it was held that where the mode of secondary picketing was otherwise lawful, the fact that some isolated employees of neutrals ceased work did not charge the Union to the extent of rendering their conduct unlawful.

Despite the fact that Respondents are alleged to be in violation of Section 8(b)(4)(A), the original charge in this case was filed for and on behalf of Southern, the primary employer, and not the restaurants. In *N. L. R. B. v. General Drivers, Warehousemen and Helpers, Local 968, supra,* the Fifth Circuit considered this a significant factor in concluding that no violation had occurred. The Court stated at page 211:

> "Of further signifiacnce is the fact that this complaint was brought at the instance of the primary employer and charging party, Otis Massey, rather than on behalf of any adversely affected secondary and neutral employers."

It is clear that the mere fact of isolated instances of delays in delivery are not "concerted" action within the meaning of Section 8(b)(4)(A) and by themselves do not affect the validity of Respondents' conduct.

Picket Line as Inducing Work Stoppages.

The General Counsel on pages 11-15 of his brief contends that the very presence of the picket line instills in organized labor an "inviolable sentiment" to respect it, that this "sentiment" itself is strong inducement and encouragement to employees, and therefore that Respondents owed a duty to proclaim in their banners that employees should not respect the picket line. On the basis of this *ex cathedra* pronouncement as to the abstract effect of a picket line on employees, the General Counsel asserts that the Board was correct in ruling that the Respondents as alleged in the complaint [R. 5-6] engaged in

> ". . . inducement or encouragement of *employees* of customers of Southern . . . and of their suppliers, shippers, wholesalers, transportation and delivery companies, to engage in strikes or *concerted refusals* to perform services for their respective employers. . . ." (Emphasis added.)

It has been clearly held that although the Board can draw reasonable inferences from facts, there must be a substantial basis to support the inferences. The Board cannot create presumptions to take the place of evidence. In *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968, supra,* the Court said:

> "While the drawing of appropriate inferences as to the unlawfulness of objective and motive in a labor dispute is primarily the province of the Board,

there still must be some substantial basis for inferring a wrongful rather than a legitimate motive." (Emphasis added.)

In *N. L. R. B. v. Houston Chronicle Pub. Co.,* 211 F. 2d 848, 854, the Fifth Circuit Court appropriately stated:

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the Respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove."

A further limitation on the Boards' power to raise presumptions to satisfy its burden of proof is set forth in *Universal Camera Corp. v. N. L. R. B., supra.* The Supreme Court therein clearly states that a reviewing court must consider all evidence which mitigates against the facts and inferences found by the Board. In this connection, the Court stated at page 488:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The courts have in numerous occasions rejected the Board's inference that the mere presence of a picket line serves to induce and encourage employees.

In *N. L. R. B. v. Electrical Workers CIO, supra,* the Court, in rejecting this contention, stated:

> "It cannot be assumed that a picket line will prevent even unionized employees from crossing it *when the Union apparently intends that they shall cross and takes steps to make its intent plain."* (Emphasis added.)

The Court continues:

> "Even the testimony of representatives of the picketed firms indicates that they had no fear that their employees would take any action to coerce them regarding their business with Royal. Their only fear seemed to be possible public embarrassment. Such embarrassment and persuasion the Union is privileged to pursue. *If on this evidence we were to grant the Board's petition with respect to the customer picketing, we would, as a practical matter, come very close to condemning all customer picketing. Clearly this is not the purpose of the Act.*" (Emphasis added.)

In *Douds v. Bakery Workers Union,* 224 F. 2d 49 (1955), the Second Circuit rejected the Board's contention that a picket line *inherently* encourages employees not to work behind it. In this case none of the delivery employees refused to cross the line. The Court said:

> "If the appellee is to be 'presumed' to intend the consequences which follow from its conduct, the inference to be drawn is that Local 50 did not intend to influence the employees of Arnold to cease work."

The court then proceeds to stress the varying methods of inducing employees, none of which were followed by the Union in that or the instant case. In this connection, the Court states:

> "The trucks were operated by members of AFL unions affiliated with the appellee. Had appellee intended to induce the drivers to engage in a concerted refusal to transport Arnold's bread, an effective means to accomplish it was available through actions by these affiliated unions. But the testimony does not even suggest that any effort was made to induce

them to act. Nor was any threat made or inducement offered to any employee of Arnold or of any other employee."

In *Crowley's Milk Company,* 102 N.L.R.B. No. 102, the Board held that conduct identical to that engaged in by Respondents did not violate Section 8(b)(4)(A), even though there were incidental work stoppages by some employees. The Board said:

> "If the picketing met the criteria announced in the *Moore Dry Dock Case,* then it was not unlawful because employees of the secondary employer or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse to do so, *for such effects are within the realm of the 'incidental'.*" (Emphasis added.)

It is also of interest that the Board in the instant case failed to make *any* finding that Respondents had as their object the inducement of employees, but simply concluded from the evidence that Respondents by picketing in fact induced and encouraged employees to engage in work stoppages. [R. 23.] In *N. L. R. B. v. Electrical Workers, CIO, supra,* the Court faced with this situation held that in the absence of a finding as to objective, the evidence must show that

> ". . . inducement was the *inevitable* result or . . . the 'natural and probable consequence' of the picketing . . ."

The record here does not support either of these findings.

Conclusion.

In *N. L. R. B. v. International Rice Milling Co., supra,* the Supreme Court stated:

> "That Congress did not seek by Sec. 8(b)(4) to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in Sec. 13 as follows:
>
> . . . . . .
>
> "By Sec. 13, Congress has made it clear that Sec. 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the Union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act."

It is clear that the Respondents' conduct at the secondary restaurants was lawful and in accordance with their statutory right under Section 7 unless they acted for the purpose of, or the "natural and probable" or "inevitable result" of the picketing was to induce employees of the restaurants or the suppliers thereof. The undisputed evidence and findings of fact make it clear that Respondents who simply desired to appeal to customers took *every reasonable precaution* in advance of and during picketing to the end that work stoppages would not occur. In this connection, the General Counsel suggests that Respondents could have handed literature to approaching employees. The obvious answer to this is that it is not the function of the Board to erect specific patterns of lawful conduct. To do so amounts to shifting the statutory burden of proof to the respondents. *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968, supra,* at page 208. The record is undisputed that of fifteen restaurants, only four incidents of delivery delays occurred while

at the same time no incidents occurred with respect of restaurant employees. Case law is clear that picketing at customer-employee entrances will not by itself render otherwise lawful conduct unlawful. *N. L. R. B. v. Electrical Workers, CIO, supra.* Case law is equally clear that incidental hesitance by individuals to work does not constitute a "concerted refusal" within the meaning of Section 8(b)(4). *N. L. R. B. v. International Rice Milling Co., supra.* The General Counsel's position is based entirely on suppositions and presumptions which have consistently been held not sufficient in and of themselves to satisfy the Board's burden of proof. If this position is adopted, then all secondary picketing will have been effectively outlawed. Such a result is contrary to the legislative intent of the framers of the National Labor Relations Act.

It is submitted that the Board, having failed to establish by substantial evidence on the entire record that Respondents intended or acted in such manner that the natural or probable or inevitable result of the picketing was to induce or encourage employees in violation of the Act, the order of the Board's petition for enforcement should be dismissed in accordance with the Trial Examiner's recommended order.

Respectfully submitted,

STEVENSON & HACKLER,

By HERBERT M. ANSELL,

Attorneys for Respondents.

APPENDIX.

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), is as follows:

Unfair Labor Practice

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.